No. 13,863

IN THE

United States Court of Appeals

For the Ninth Circuit

JOAO SIMOES BARREIRO,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF OF APPELLEE.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets, San Francisco 1, California,
Attorneys for Appellee.

MILTON T. SIMMONS,
District Counsel,
Immigration and Naturalization Service,
San Francisco, California,
On the Brief.

Subject Index

Table of Authorities Cited

Cases

Statutes, Regulations and Rules

Articles

No. 13,863

IN THE

United States Court of Appeals

For the Ninth Circuit

JOAO SIMOES BARREIRO,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE FACTS.

Appellant is a native and citizen of Portugal who last entered the United States on April 22, 1930 at the port of Jersey City, New Jersey as a stowaway. He has remained in the United States since that time. He registered for Selective Service on October 16, 1940 and on May 9, 1941 was classified IV-E. He was reclassified I-A in September, 1942. He was married September 12, 1942. The appellant was arrested in deportation proceedings and deportation hearings were held on January 10, 1944, January 31, 1944, April 3, 1944 and April 5, 1944. During the course of the deportation hearings it was developed that the

appellant had on April 8, 1943 filed with his Local Selective Service Board form DSS 301, in which form he sought exemption from military service as a neutral alien. He had the form prepared by a notary public, read it and signed it. He was thereafter reclassified IV-C. When questioned on this point during the deportation hearing it was found that he sought exemption as a neutral alien after his employers had unsuccessfully sought his deferment and he had submitted a marriage certificate to his draft board only to be informed that he would not be deferred as a married man because his marriage had occurred within the past few months. On June 30, 1944 the presiding inspector of the Immigration and Naturalization Service prepared his proposed order, finding that the appellant ought *not* be granted suspension of deportation. Thereafter the Board of Immigration Appeals ordered the case reopened for the purpose of giving appellant an opportunity to present to Selective Service his request that his application for exemption from military service be withdrawn. Reopened hearing was held on July 11, 1945, at which time it was developed that the appellant had on April 27, 1945 written to his draft board declaring his desire to withdraw his claim of exemption from Selective Service. He was advised that the Form DSS 301 could not be withdrawn from the Selective Service files and "the effect of DSS form 301 being on file is a matter for the Courts to determine." The presiding inspector then found the appellant ineligible for suspension of deportation on the

ground that he was an alien ineligible to citizenship in that he had claimed exemption from military service as a neutral alien. The proceedings were again reopened in 1949 and the presiding officer reaffirmed the previous decision.

Appellant filed this action under Title 28 U.S.C. 2201 against the Attorney General of the United States for a declaratory judgment declaring him to be eligible for suspension of deportation and eligible for United States citizenship. The Court below found that the appellant was ineligible for citizenship and ineligible for suspension of deportation.

STATUTES AND REGULATIONS INVOLVED.

LAW.

54 *Stat.* 885 (1940) as amended (50 *U.S.C.* App. par. 303(a) 1946):

"Except as otherwise provided in the Act * * * every male citizen of the United States and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a netural country shall be relieved from liability for training and service under this Act * * * if, prior to his induction into the land or naval forces he has made application to be relieved from such liability in the manner prescribed by the President, *but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States.*" (Italics supplied.)

8 *U.S.C.* 155:

"In the case of an alien * * * who was deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * * * * (2) suspend deportation of such alien if *he is not ineligible for naturalization,* or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * * *"

SELECTIVE SERVICE REGULATIONS
(7 Fed. Reg. 855)

Para. 611.12. "When a *nondeclarant alien* is residing in the United States. Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of Para. 611.13, is 'a male person residing in the United States' within the meaning of Section 2 and Section 3 of the Selective Training and Service Act of 1940, as amended."

APPELLANT'S SPECIFICATION OF ERRORS.

1. That the evidence in said action was and is insufficient to justify the findings of fact and conclusions of law heretofore made by the said District Court.

2. That the evidence in said action was and is insufficient to justify or support the judgment entered in said action in and by the said District Court;

3. That the findings of fact and conclusions of law made by the said District Court are insufficient to support and do not support the said judgment;

4. That the said District Court committed error and violated the provisions of Rule 52(a) of the Federal Rules of Civil Procedure in that the said District Court failed and refused to especially find or make any findings whatsoever upon the allegations set forth in paragraphs II, III, IV, V, VI, VII and VIII of plaintiff's complaint on file in the above-entitled action.

5. That the said District Court erred in denying the motion of plaintiff for a new trial in the above-entitled cause.

6. That said District Court erred in denying the motion of plaintiff to amend, change, alter and substitute findings.

ARGUMENT.

The government admits that the appellant would be eligible for suspension of deportation if he were eligible for citizenship. Therefore, the sole issue in this case is appellant's eligibility for citizenship as attested by his execution of Form DSS 301.

Although appellant specifies six errors of the Court below he raises only two main questions in his argu-

ment. First, that the appellant had a right to withdraw his claim of exemption from military service; second, that the judgment must be reversed because the Court below failed to find on all the material allegations.

I.

THE RIGHT OF APPELLANT TO WITHDRAW HIS CLAIM OF EXEMPTION.

The first issue raised by appellant is the right to withdraw a claim of exemption from military service from the file of the Selective Service Board. The record discloses that appellant after failing to obtain deferment, first by reason of his employment, and then by reason of marriage, filed the Form DSS 301. (Tr. 75.) Appellant, in the District Court, contended that his filing of the form DSS 301 was on the advice of his Draft Board and that therefore he should have been excused from the effect of filing the form. As the appellant does not advance this contention before this Court it is assumed to have been abandoned.

There was no merit to this contention. During the deportation hearing on January 10, 1944 the appellant testified (Tr. 44):

> "A. I asked for that classification because I am a neutral alien. At the time I registered I was not married and they put me in 4-C, then after I got married they classified me as 1-A and then at my own request they put me back in 4-C. I wish to state that when the war started I quit my business and tried to enlist in the United

States Navy and they didn't take me because I was an alien. Then I tried the Coast Guard also, but they wouldn't take me. I tried to go to Brazil as an interpreter for the United States government but they turned me down because I was an alien. After that I tried to secure employment at Pacific Bridge Company and they wouldn't take me because I was an alien. Then I went to work at the Bethlehem Shipyard for one day and when they checked up with the San Francisco office I had to leave because they would not continue my employment because I was an alien. Since then I own my own apartment house and home and have a wife and one child and that is the reason I wanted to be exempted from the draft."

On April 3, 1944, he testified (Tr. 63-64):

"Q. When were you classified in class I-A?

A. In September, 1942, the first time. After that my employers, the Atlas Imperial Diesel Engine Company tried to have my case deferred but they would not (18) do so and continued to put me in I-A, then my company appealed the decision and I was placed in I-A on appeal.

(Note: Presents 3 classification cards issued to him, Order No. 1875. The first one is dated September 14, 1942, classified I-A; the second is dated January 28, 1943, classified I-A by Local Board; the 3rd card, dated March 22, 1943, shows that the classification I-A has been affirmed by the Board of Appeal by a vote of 3-0. These 3 cards were returned.)

Q. When were you reclassified the last time in IV-C?

A. June 10, 1943.

Q. In what manner did you secure your classification in IV-C on June 10, 1943?

A. By filing a DSS Form 301, application of an alien for relief from United States military service.

Q. Did you fill that form out yourself before you signed it?

A. Mr. Reeves, a real estate man on Fruitvale Avenue, near 14th Street, Oakland, a notary public, filled it out for me and I signed it.

Q. Did you read over this DSS form 301 before you signed it?

A. Yes.

Q. At the time you filled out this form and signed it were you already married?

A. Yes.

Q. For what reason did you ask for deferment classification IV-C when as a married man you could apply for classification as a married man?

A. I tried to do that, but I was told I would be considered as a single man because I had just been married a few months."

(Tr. 65-66):

"Q. Do you wish to become a citizen of the United States?

A. If it is possible, yes. At the time I filed that form 301 I was illegally in the United States and figured I couldn't become a citizen anyway. I figured I am Portuguese and would have to remain with my country as long as I am a Portuguese citizen.

Q. You have been living continuously in this country for nearly 14 years and you have been

earning a good living here. Do you feel that you owe anything to this country?

A. Yes, sir.

Q. Then why did you not stand by your responsibilities and if called into the United States Army serve in it without applying for reclassification as an alien?

A. Because I am not sure how long I am going to stay here, if I stay or not, on account of being illegally in this country. I respect all the United States laws. If I don't like any laws of the United States I should go out of this country voluntarily. I live here because I like the United States laws.

Q. If you were required to do so would you bear arms for the United States, either in this country or any other place?

A. Yes, if I am a permanent resident of this country and I want to be a citizen before I serve in the United States Army. Of course if I get a permanent residence so that I can get citizenship in two months.

Q. Have you any objection to serving in the United States Army?

A. I don't like the Army. I tried to go in the Navy or Coast Guard or Merchant Marine when I was single. Right now I don't want to, anywhere; I want to stay here with my family, if it is possible. If it is not possible I will go."

It is clear from the appellant's own testimony that he knew the nature of the form he was signing and fully realized the consequences of claiming exemption as a neutral alien.

Appellant now contends that because he attempted to *withdraw* the form DSS 301, he is not barred from citizenship. The record contains a letter (Pl. Ex. 2, Tr. 129) from the Selective Service Board by which the appellant was informed that the form DSS 301 could not be withdrawn and that "the effect of the DSS 301 form being on file is a matter for the Courts to determine."

The leading cases on the effect of filing Form DSS 301 are cited by appellant. *Moser v. United States,* 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; *Machado v. McGrath,* 193 F. 2d 706.

However, they fail to support his contention in the case at bar. In the *Moser* case, a Swiss national believed he was exempt from military service by reason of a treaty between his country and the United States. Upon advice of the Swiss Legation he filed a form DSS 301 which had been revised. He relied upon the advice of his legation that he would not thereby lose his citizenship.

In the *Machado* case, the alien filed DSS 301 under the belief that he was claiming exemption as a non-resident rather than as a neutral alien. It was also shown that the alien lacked an understanding of the English language. The Court stated in the *Machado* case:

> "As in the *Moser* case, we believe Machado was entitled to have the 'opportunity to make an intelligent election' *between being subject to the draft on the one hand and being exempt but*

> *losing a right to become a citizen on the other.* See: *Johnson v. United States*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 701. The sound reason for affording such an opportunity arises in good part from our conviction that American citizenship being a most precious right, its denial should not be allowed to rest upon a doubtful premise."

Both cases stand for the principle that the alien involved must have an opportunity to elect "between being subject to the draft on the one hand, and being exempt but losing a right to become a citizen on the other."

The appellant in this action did have "an opportunity to elect" and did elect to "being exempt * * * a citizen." He had the assistance of a notary public in preparing DSS 301, he had demonstrated throughout the deportation and Court proceedings that he understands the English language. He states that he read form DSS 301 before he signed it, and his statement that "I couldn't become a citizen anyway" shows clearly that he knew that by signing the form he would become ineligible to citizenship.

In the *Machado* case, supra, a similar attempt was made to withdraw the claim of exemption and the same reply was received from the draft board as appellant herein received. However, the effect of the attempt to withdraw was not an issue in that case.

There have been a number of naturalization petitions filed in the District Court by persons who had

filed form DSS 301 and later attempted to withdraw it.

In re Martinez, 73 F. Supp. 101;
In re Molo, 107 F. Supp. 137;
Petition of Perez, 81 F. Supp. 591.

In all these cases it was held that the petitioner was ineligible for citizenship.

Appellant herein claimed the advantage of Form DSS 301 on April 8, 1943 and thereafter successfully avoided military service for the duration of World War II. His attempt to accomplish the same result by job deferment and then by marriage had been unsuccessful. It was not until April 27, 1943 that he wrote to the draft board seeking to withdraw the DSS 301. Obviously it could not be withdrawn as it was the basis of his reclassification to IV-C in 1943 and the continuance of said classification thereafter. It is interesting to note that the attempt to withdraw the DSS 301 was not contemplated until it was suggested as a possible way to circumvent deportation.

Appellant became ineligible for citizenship when he voluntarily filed DSS 301 and he was thereby ineligible for suspension of deportation (8 *U.S.C.* 155).

II.

THE FINDINGS ARE SUFFICIENT TO SUPPORT THE ULTIMATE CONCLUSION OF THE COURT.

Appellant contends that findings should have been made upon each of the allegations contained in the

complaint. He cites a number of California decisions. This contention is not deemed to be of sufficient merit to warrant serious consideration. Rule 52(a) of the Federal Rules of Civil Procedure does not require the Court to make findings on all the facts presented or make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the Court they are sufficient.

Carr v. Yokohama Specie Bank, 200 F. 2d 251, 255 (C.A. 9);

Norwich Union Ind. v. Hass, 179 F. 2d 827, 832 (C.A. 7);

8 *Fed. Rules Dec.* 271.

It is respectfully submitted that the judgment of the lower Court is fully supported by the evidence and the law and should be affirmed.

Dated, San Francisco, California,
October 16, 1953.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

MILTON T. SIMMONS,
District Counsel,
Immigration and Naturalization Service,
On the Brief.